

1994

Dean K. Hickman and Rick K. Hickman v. Tamara Holden and Fred Van Der Veur : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DEAN K. HICKMAN and	:	
RICK K. HICKMAN,	:	
	:	
Petitioners-Appellants,	:	
	:	
v.	:	Case No. 940109-CA
	:	
TAMARA HOLDEN and	:	
FRED VAN DER VEUR,	:	
	:	Priority No. 3
Respondents-Appellees.	:	

BRIEF OF APPELLEES

- - - - -

APPEAL FROM THE DENIAL OF A PETITION FOR POST-
CONVICTION RELIEF, IN THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE KENNETH RIGTRUP,
PRESIDING.

UTAH COURT OF APPEALS
BRIEF

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940109

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ORAL ARGUMENT NOT REQUESTED

FILED
Utah Court of Appeals
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Marilyn M. Branch
Clerk of the Court

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BRIEF OF APPELLEES

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the district court's denial of a petition for post-conviction relief involving first degree felonies. The Utah Supreme Court initially had sole jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(i) (Supp. 1993). However, jurisdiction was transferred to this Court pursuant to Utah Code Ann. § 78-2-2(4) (Supp. 1993).

**STATEMENT OF ISSUES PRESENTED ON APPEAL AND
STANDARD OF APPELLATE REVIEW**

Petitioners filed a petition for post-conviction relief alleging ineffective assistance of trial counsel. After an evidentiary hearing, the district court denied the petition. The issues raised on appeal are:

1. Is petitioners' claim of ineffectiveness for failure to pursue a direct appeal moot based upon the fact that petitioners

received appellate review of the denial of their motion to withdraw their guilty pleas?

2. Did the district court correctly determine that petitioners failed to demonstrate prejudice?

3. Was the district court required to determine if counsel's performance was deficient?

On appeal from the denial of a petition for post-conviction relief, the appellate court "survey[s] the record in the light most favorable to the findings and judgment; and [it] will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted.'" Bundy v. DeLand, 763 P.2d 803, 805 (Utah 1988) (citations omitted). When the denial includes rulings on questions of law, the trial court's legal conclusions are reviewed de novo. Parsons v. Barnes, 871 P.2d 516, 518 (Utah), cert. denied, 115 S.Ct. 431 (1994); Gerrish v. Barnes, 844 P.2d 315, 318-19 (Utah 1992); Stewart v. State, 830 P.2d 306, 308-09 (Utah App. 1992). However, the trial court's findings of fact will be disturbed only if clearly erroneous. Parsons, 871 P.2d at 518; State v. Tyler, 850 P.2d 1250, 1253 (Utah 1993); Stewart, 830 P.2d at 309. Claims of ineffective assistance of counsel present a mixed question of fact and law. Parsons, 871 P.2d at 518 (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes or rules pertinent to the resolution of the issues presented are contained in the body of this brief.

STATEMENT OF THE CASE

On January 18, 1985, petitioners pled guilty to aggravated robbery, a first degree felony (R. 76-79; Addendum A). The trial court sentenced each petitioner to serve a term of five years to life at the Utah State Prison (R. 35 & 68; Addenda B & C). Brooke Wells represented petitioner Dean Hickman and Manny Garcia represented petitioner Rick Hickman (id.). On July 6, 1988, petitioners separately moved to withdraw their guilty pleas (R. 9-19 & 39-59). The trial court denied petitioners' motions (R. 36-38 & 71-73). In August 1988, petitioners appealed, pro se, to the Utah Supreme Court (State v. Hickman, 779 P.2d 670 (Utah 1989); R. 128-131; Addendum D)). The Utah Supreme Court affirmed the trial court's ruling (id.).

Petitioners filed a petition for post-conviction relief on April 10, 1992, claiming that their counsel were ineffective because: (1) counsel coerced them into pleading guilty by threatening them with additional charges and prison time, and by allowing Detective Don Bell to be present during confidential discussions; (2) counsel failed to file any discovery motions; (3) counsel falsified the plea affidavits in that the affidavits represented that petitioners took personal property from the victim; (4) Brooke Wells told petitioner Dean Hickman that she

would appear before the Board of Pardons and guaranteed that he would only spend five years in prison; and (5) counsel refused to appeal on petitioners' behalf (R. 2-8).

After an evidentiary hearing on July 27 & 28, 1993, the district court denied the relief requested in the petition (R. 156-159; Addendum E). Andrea C. Alcabes represented petitioners during the post-conviction evidentiary hearing (id.).

STATEMENT OF FACTS

Petitioners were originally charged with attempted first degree murder, aggravated burglary and aggravated robbery, all first degree felonies, in case no. CR 84-1436 (Hickman, 779 P.2d at 671; R. 128-131; Addendum D). Petitioner Rick Hickman was also charged with a second degree felony burglary and an aggravated sexual assault, a first degree felony, in case no. 84 FS 2514 (R. 28; Addendum B). Petitioner Rick Hickman was also charged with a West Valley City robbery and burglary (id.). Petitioner Rick Hickman also had a federal parole hold placed on him in connection with a robbery charge (Tr. at 26; R. 200). Petitioner Dean Hickman was charged with other felony offenses in a West Valley City case (R. 62; Addendum C). Pursuant to plea negotiations, petitioners pled guilty to aggravated robbery (R. 76-79; Addendum A), and all remaining charges were dismissed. Additionally, the plea bargain provided that any charges the State was currently investigating regarding Dean Hickman would not be brought (R. 62-67; Addendum C). Finally, the information with respect to each petitioner was amended to reflect a deadly weapon other than a firearm in order to

avoid a mandatory firearm enhancement (R. 29, R. 61-62; Addenda B & C). On or about December 15, 1984, when petitioners appeared for the preliminary hearing, they met with counsel in a small room in the circuit court building to discuss the charges against them (R. 157; Addendum E).

Petitioners filed separate motions to withdraw their guilty pleas (R. 9-19, 39-59). The trial court denied petitioners' motions and they appealed, claiming that there was no factual basis for their guilty pleas (Hickman, 779 P.2d at 671; R. 129; Addendum D). Additionally, petitioner Dean Hickman claimed that the trial court failed to ask him whether his plea was free from threats, promises, and inducements, as required by rule 11, Utah Rules of Criminal Procedure (id. at 672). The Utah Supreme Court affirmed the trial court's rulings finding that there was sufficient factual basis for petitioners' guilty pleas and that petitioner Dean Hickman entered his guilty plea "free from threats or promises" (id.).¹

Discovery

In lieu of testifying at the evidentiary hearing, Brooke Wells, petitioner Dean Hickman's former attorney, gave her testimony at a deposition.² Ms. Wells testified that she

¹Petitioner Rick Hickman did not challenge the voluntariness of his guilty plea and, therefore, the Utah Supreme Court did not address it.

²Ms. Wells had a trial scheduled on the dates of the evidentiary hearing. Rather than reschedule the hearing, the parties agreed to use Ms. Wells' deposition testimony. Both

represented Dean Hickman in 1984 and 1985 concerning the aggravated robbery charge to which he pled guilty, as well as on other charges (Depo. at 4; Addendum F). Ms. Wells testified that by the date scheduled for petitioners' preliminary hearing, she had acquired all discovery materials and, since a plea bargain had been reached, she felt no need to file for additional discovery (Depo. at 7; Addendum F). Additionally, the district court found that Ms. Wells advised both petitioners, at least in a conclusory manner, that there was substantial evidence against them (R. 157; Addendum E).

At the evidentiary hearing, Manny Garcia testified that he represented petitioner Rick Hickman in 1985 concerning numerous robberies, burglaries, an attempted murder and an aggravated sex assault (Tr. at 25-26; R. 199-200). Petitioner Rick Hickman pled guilty to one count of aggravated robbery in exchange for dismissal of the other charges (Tr. at 26; R. 200). Mr. Garcia testified that, although he had no specific memory regarding discovery, he automatically filed a request for discovery along with his appearance of counsel form in every case (Tr. at 28; R. 202). Mr. Garcia testified that he would most likely have had discovery materials by the time of the preliminary hearing (id.; Tr. at 30; R. 204). Additionally, at the conclusion of the evidentiary hearing, the district court stated that it could not remember a

petitioners were present at the deposition, as was their attorney, Andrea Alcabes (Deposition ("Depo"); Addendum F).

Although the original deposition is unexplainably missing from the district court's record, it was marked as an exhibit and offered into evidence at the evidentiary hearing (R. 145, 147, 194-196).

district court file involving the Legal Defender's Office where a request for discovery was not filed with a formal written appearance of counsel because it was LDA's routine practice to do so (Tr. of Evid. Ruling at 2; Addendum G). The district court further noted that the criminal charges had not reached the district court level at the time the plea bargain was reached (id.).

Plea Negotiations

During plea negotiations, Ms. Wells informed petitioner Dean Hickman that there were possibly other charges under investigation that might be brought unless he accepted the plea bargain (Depo. at 5; Addendum F). However, Ms. Wells neither threatened nor coerced petitioner Dean Hickman into pleading guilty (Depo. at 4-5; Addendum F). Ms. Wells advised petitioner Dean Hickman that it was in his best interest to plead guilty to the one count of aggravated robbery without a firearm enhancement because it would minimize the amount of time he would spend in prison, and because it was the lesser (in terms of stigma) of three very serious charges (Depo. at 5, 8; Addendum F). However, Ms. Wells never told petitioner Dean Hickman that he would spend a specific number of years in prison by either accepting or rejecting the plea agreement because the authority to determine the number of years an inmate spends in prison rests solely with the Utah Board of Pardons (Depo. at 5-6, 9; Addendum F).

Mr. Garcia testified that he did not coerce petitioner Rick Hickman into accepting the plea bargain (Tr. at 26; R. 200).

Mr. Garcia informed petitioner Rick Hickman that additional burglary charges were going to be filed, but did not threaten petitioner with these additional charges (id.). Mr. Garcia testified that he did not tell petitioner Rick Hickman a certain number of years that petitioner would spend in prison (Tr. at 27; R. 201). Mr. Garcia had no knowledge of how much time petitioner Rick Hickman would spend in prison except based upon the charge which carried a sentence of 5-life (id.).

Detective Don Bell

Ms. Wells testified that Detective Don Bell was not present during any confidential attorney-client discussions (Depo. at 6; Addendum F). Detective Bell was present at the courthouse for the preliminary hearing which petitioners subsequently waived, but Ms. Wells does not recall Detective Bell ever being present during confidential discussions with petitioner Dean Hickman (id.).

Mr. Garcia testified that Detective Bell was present during part of an attorney-client meeting with petitioners at the circuit court in order to provide more information regarding discovery, but that Detective Bell was not present during actual plea negotiations (Tr. at 27-28; R. 201-202). Mr. Garcia testified that it would be totally improper for Detective Bell to sit in on confidential plea discussions (Tr. at 28; R. 202).

The district court found that Detective Bell was present during the latter portion of the meeting at the circuit court between petitioners and counsel (R. 157; Addendum E).³

Detective Bell testified that his first contact with petitioners was in December 1984 at the jail several hours after they had been arrested (Tr. at 86-88; R. 260-262). Detective Bell was accompanied by Detective Jerry Mendez (Tr. at 88, 93; R. 262, 267). Petitioners did not wish to speak to the detectives, so the detectives left (id.). Detective Bell next saw petitioners at the preliminary hearing in January 1985 (Tr. at 89; R. 263). Detective Bell did not sit in on any plea negotiations between petitioners and their respective attorneys (id.).

Appearance Before Board of Pardons

Ms. Wells testified that she did tell petitioner Dean Hickman that she would appear with him before the Board of Pardons because it is her standard practice to offer that help to her clients (Depo. at 9; Addendum F). However, Ms. Wells did not receive notice of a Board of Pardons hearing and, therefore, did not appear (id.).

³This finding is not in conflict with Ms. Well's testimony. Ms. Wells testified only that Detective Bell was not present during actual confidential plea bargain discussions. Therefore, it is entirely possible for Detective Bell to have been present only to provide information regarding pending charges, as Mr. Garcia testified. The district court did not find that Detective Bell was present during confidential plea bargain discussions.

Direct Appeal

Ms. Wells testified that petitioner Dean Hickman did not ask her to pursue a direct appeal on his behalf (Depo. at 9; Addendum F). Based upon this and the fact that appellate rights are essentially waived by pleading guilty, Ms. Wells did not file a direct appeal on petitioner Dean Hickman's behalf (id.). In June of 1988, Ms. Wells sent a letter to petitioner Dean Hickman regarding habeas corpus relief (id.). The Legal Defender contract prohibits LDA attorneys from representing clients beyond the first appeal of right (Depo. at 10; Addendum F). In her 1988 letter, Ms. Wells explained this to petitioner and gave him the name of the firm that had the contract with the prison to handle post-conviction matters (id. at Exhibit A; Addendum F).

Mr. Garcia testified that he explained the waiver of appellate rights to petitioner Rick Hickman and that petitioner signed the plea affidavit indicating such (Tr. at 28-29; R. 202-203). Mr. Garcia did not recall petitioner Rick Hickman ever asking him to file a motion to withdraw petitioner's guilty plea (Tr. at 29; R. 203).

SUMMARY OF THE ARGUMENT

Petitioners claim of ineffectiveness concerning counsel's failure to pursue a direct appeal is moot because petitioners received appellate review of the denial of their motions to withdraw their guilty pleas. Accordingly, this Court need not reach the merits of this issue.

The district court correctly determined that petitioners failed to establish that their counsel were ineffective. Petitioners failed to demonstrate that but for counsel's representation, they would not have pled guilty and would have insisted upon going to trial. Additionally, petitioners failed to prove that had counsel filed formal discovery motions, they would have discovered exculpatory information prior to the time petitioners pled guilty. Accordingly, petitioners failed to satisfy the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984) and Hill v. Lockhart, 474 U.S. 52 (1985).

Finally, petitioners claim that the district court incorrectly refused to reach the merits of their claim that counsel coerced them into pleading guilty. This claim is part of petitioners' list of ineffectiveness allegations and, thus, is covered by the district court's ruling that petitioners failed to demonstrate prejudice. The district court did not make findings or conclusions regarding the deficient performance prong because it was not obligated to, having found a lack of prejudice. Nevertheless, the record is devoid of any coercion.

ARGUMENT

POINT I

PETITIONERS' CLAIM REGARDING COUNSEL'S FAILURE TO PURSUE A DIRECT APPEAL IS MOOT AND, THEREFORE, SHOULD NOT BE CONSIDERED BY THIS COURT

Petitioners claim that their counsel were ineffective for failing to pursue a direct appeal. Even assuming that petitioners

were denied their right to a direct appeal, the appropriate relief would be to resentence petitioners so that they may pursue a direct appeal. See State v. Hallett, 856 P.2d 1060, 1062 (Utah 1993); State v. Johnson, 635 P.2d 36, 38 (Utah 1981); Boggess v. Morriss, 635 P.2d 39, 43 (Utah 1981). However, petitioners received appellate review of their guilty pleas on appeal from the denial of their motions to withdraw (Hickman, 779 P.2d 670; R. 128-131; Addendum D). Since petitioners have already received direct review of their guilty pleas (and are currently receiving appellate review of their ineffectiveness allegations), their claim is moot. See Duran v. Morris, 635 P.2d 43, 45 (Utah 1981) (case moot if requested relief cannot affect the rights of the litigants); Spain v. Stewart, 639 P.2d 166, 168 (Utah 1981) (postconviction claim rendered moot if the relief requested has been granted). Accordingly, this Court should refuse to reach the merits of this issue.

POINT II

THE DISTRICT COURT PROPERLY DETERMINED THAT PETITIONERS FAILED TO DEMONSTRATE PREJUDICE AS REQUIRED BY STRICKLAND AND HILL

In order to prevail on their claims of ineffective counsel, petitioners must demonstrate that: (1) specific acts or omissions fall outside the wide range of professionally competent assistance; and (2) counsel's deficient performance prejudiced the outcome of the proceeding. State v. Frame, 723 P.2d 401, 405 (Utah 1986) (citing Strickland v. Washington, 466 U.S. 668 (1984)). To satisfy the first of the two prongs, petitioner must demonstrate

that counsel's "representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. This requires a showing that counsel made errors so serious that they were not functioning as the "counsel" guaranteed by the sixth amendment. Id. Accord State v. Templin, 805 P.2d 182, 186 (Utah 1990). However, the court will not second-guess counsel's legitimate strategic choices, regardless of how flawed those choices might appear in retrospect. Strickland, 466 U.S. at 689. Petitioners must therefore overcome the strong presumption that counsel's performance fell "within the wide range of reasonable professional assistance." Id. See also State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993); State v. Wood, 648 P.2d 71, 91 (Utah), cert. denied, 459 U.S. 988 (1982).

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court clarified the requirements of the prejudice prong with respect to allegations of ineffective counsel during the plea process. The Court held that in order to satisfy the prejudice prong of Strickland, a petitioner "must show that there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59 (emphasis added). The purpose of requiring a demonstration of prejudice from petitioners who challenge the validity of their guilty pleas on the ground of ineffective counsel is to maintain the "fundamental interest in the finality of guilty pleas." Id. at 58.

The district court specifically concluded that petitioners failed to demonstrate that absent counsel's representation, they would not have pled guilty and would have insisted upon going to trial (R. 158; Addendum E; Tr. of Evid. Ruling; Addendum G). Accordingly, the district court properly ruled that petitioners failed to demonstrate prejudice under Strickland and Hill.

Petitioners have failed to point to record evidence which contradicts the district court's conclusion. Both petitioners did testify that if they had been aware of the evidence against them (i.e. the identity of the State's witnesses), they would not have pled guilty (Tr. at 57, 81; R. 231, 255). Nevertheless, the district court has the responsibility of ascertaining the credibility of the witnesses and apparently did not find petitioners' testimony credible, a determination fully within its province. Utah R. Civ. P. 52(a); Sprouse v. Jager, 806 P.2d 219, 222 (Utah App. 1991) ("We give great deference to the trial court's findings, especially when they are based on an evaluation of conflicting live testimony.") (citation omitted).

Petitioners testified only that discovery information would have influenced their decisions to plead guilty (Tr. at 57, 81; R. 231, 235). Petitioners' claims failed because: (1) the district court did not accept their statements as credible, in

light of the totality of the circumstances;⁴ and (2) petitioners failed to demonstrate that formal discovery would have produced any exculpatory information. See Parsons v. Barnes, 871 P.2d 516, 526 (Utah), cert. denied, 115 S.Ct. 431 (1994) (to prove prejudice regarding a claim of ineffectiveness for failure to file a formal discovery motion, petitioner must show that filing a formal motion would have yielded exculpatory information); Fernandez v. Cook, 870 P.2d 870, 877 (Utah 1993) ("proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.").

Petitioners have not demonstrated that formal discovery would have produced any exculpatory information. Petitioners have asserted only that they would not have pled guilty had they known who the State's witnesses would have been. Petitioners knowingly and voluntarily entered their pleas and were competently represented in the process. Furthermore, neither petitioner testified that they would not have pled guilty absent counsel's

⁴Given the numerous serious charges petitioners faced that were dismissed as part of the plea bargain, it is unlikely that they would have insisted upon going to trial on three (3) first degree felonies and subjected themselves to other charges that would have been filed, regardless of counsel's actions or inactions.

other alleged deficiencies.⁵ Therefore, this Court should affirm the district court's ruling.

POINT III

THE DISTRICT COURT WAS NOT REQUIRED TO DETERMINE WHETHER COUNSEL'S PERFORMANCE WAS DEFICIENT

Petitioners claim that the district court erred by failing to consider their allegation that counsel coerced them into pleading guilty. The district court received testimony regarding the alleged coercion (because it was part of the laundry list of ineffectiveness claims), but chose to deny petitioners' requested relief solely on the lack of prejudice, without reaching the deficient performance issue. The district court was not required to address the deficient performance prong of Strickland since it found no prejudice. See State v. Frame, 723 P.2d 401, 405 (Utah 1986) (reviewing court "need not determine whether counsel's performance was deficient if defendant fails to satisfy his burden of showing that he suffered unfair prejudice as a result of the alleged deficiencies.").

Despite the foregoing, both counsel testified that they neither threatened nor coerced petitioners into pleading guilty. Petitioners each signed a plea affidavit and participated in a rule

⁵In their brief, petitioners claim that they would not have pled guilty absent counsel allowing Detective Bell to attend confidential plea discussions. However, there is no testimony from petitioners that supports this claim. Petitioners testified that they would not have pled guilty only in response to Ms. Alcades' question regarding knowledge of discovery information (Tr. at 57 & 81; R. 231 & 255).

11, Utah Rules of Criminal Procedure, colloquy with the trial court (Addenda B & C). Petitioners claim they never read the plea affidavits and were coached by counsel throughout the plea colloquy. However, petitioners told the trial court that they had read and understood their respective plea affidavits and petitioners signed their plea affidavits in open court (R. 30-31, 66-67; Addenda B & C). The plea colloquy is devoid of any coaching by either defense counsel, and the trial court specifically found that petitioners' pleas were voluntarily entered (R. 34, 68; Addenda B & C). Additionally, the Utah Supreme Court has previously ruled that petitioner Dean Hickman's guilty plea was free from threats or promises (Hickman, 779 P.2d at 672; R. 130; Addendum D). Petitioners' allegations of coercion are simply unsupported by the record and, thus, their requested relief should be denied.

CONCLUSION

Based upon the foregoing, respondents respectfully request that this Court affirm the district court's denial of the petition for post-conviction relief.

ORAL ARGUMENT NOT REQUESTED

In accordance with this Court's procedure concerning oral argument and the issuance of opinions, effective January 1, 1995, Respondents-Appellees do not request oral argument.

RESPECTFULLY SUBMITTED this 27th day of February, 1995.

JAN GRAHAM
Attorney General

Angela E. Micklos
ANGELA E. MICKLOS
Assistant Attorney General
Criminal Appeals Division

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **BRIEF OF APPELLEES** was mailed, postage prepaid, this 27th day of February, 1995 to:

James L. Warlaumont
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Angela E. Micklos

ADDENDA

ADDENDUM A

Plea Affidavits

FILED IN CLERK'S OFFICE
Lake County Utah

In the District Court of the Third Judicial District
State of Utah

JAN 18 1985

THE STATE OF UTAH, }
Plaintiff
vs. DEAN KEITH HICKMAN }
Defendant

H. Dixon Hindley, Clerk 3rd Dist.
By James Owsen Deputy Cl.
Affidavit of Defendant

Criminal No. 84-1436

I, DEAN KEITH HICKMAN, under oath, hereby acknowledge that I have entered a plea of guilty to the charge(s) of:

AGGRAVATED ROBBERY (1 Count)
(Name of Crime)

Elements:

Δ UNLAWFULLY AND
INTENTIONALLY TOOK
PERSONAL PROPERTY
IN POSSESSION OF ANOTHER,
AGAINST HIS WILL, BY
USE OF A WEAPON
DEADLY

Facts:

Δ, ON 11/1/84 AT 965 S.
2200 EAST Δ TOOK
PROPERTY OF A.W. NELSON
WITHOUT CONSENT BY USE
OF A DEADLY WEAPON

I have received a copy of the charge (information) and understand the crime I am pleading guilty to is a —

FIRST DEGREE FELONY

(Degree of Felony or Class of Misdemeanor)

and understand the punishment for this crime may be 5 YEARS TO LIFE

prison term. \$10,000 fine, or both. I am not on drugs or alcohol.

My plea of guilty is freely and voluntarily made. I am represented by Attorney BROCKE WELLS who has explained my rights to me and I understand them.

1. I know that I have a constitutional right to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by a judge should I desire.

2. I know that if I wish to have a trial, I have a right to see and hear the witnesses against me in open court in my presence and before the Judge and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have my witnesses subpoenaed at state expense to testify in court upon my behalf and that I could testify on my own behalf, and that if I choose not to do so, the jury will be told that this may not be held against me.

3. I know that if I were to have a trial that the prosecutor must prove each and every element of the crime charged beyond a reasonable doubt, that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a complete agreement of all jurors.

4. I know that under the constitution that I have a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify unless I choose to do so.

5. I know that under the constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me.

6. I know and understand that by entering a plea of guilty I am giving up my constitutional rights as set out in the preceding paragraphs and that I am admitting I am guilty of the crime to which my plea of guilty is entered.

7. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed on me.

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8. I know that the fact that I have entered a plea of guilty does not mean that the Judge will not impose either a fine or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be.

9. No promises or threats of any kind have been made to induce me to plead guilty. The following other charges pending against me, to-wit: (Court case number(s) or count(s)):

Counts I & II OF THIS INFORMATION;

CR (24-558) AGG. ROBBERY NO OTHER CASES KNOWN TO ME WILL BE FILED
will be dismissed, and that no other charge(s) will be filed against me for other crimes I may have committed which are now known to the prosecuting attorney. I am also aware that any charge or sentencing concessions or recommendations or probation or suspended sentences, including a reduction of the charges for sentencing made or sought by either defense counsel or counsel for the State, is not binding on the Judge and may not be approved by the Judge.

10. I have read this Affidavit, or I have had it read to me by my attorney, and I know and understand its contents. I am 20 years of age, have attended school through the 12th and I can read and understand the English language.

Dated this 18 day of JANUARY, 19 85.

Dean Keith Hickman
Defendant

Subscribed and sworn to before me in Court this 18 day of January, 19 85

Kevin Bush
Judge

CERTIFICATE OF DEFENSE ATTORNEY:

I certify that I am the attorney for DEAN KEITH HICKMAN the defendant named above and I know he has read the Affidavit, or that I have read it to him, and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing Affidavit are in all respects accurate and true.

Brooks E. Woods
Defense Attorney

CERTIFICATE OF PROSECUTING ATTORNEY:

I certify that I am the attorney for the State of Utah in its case against DEAN KEITH HICKMAN defendant. I have reviewed the Affidavit of the defendant and find that the declarations are true and accurate. No improper inducements, threats, or coercions to encourage a plea have been offered the defendant. There is reasonable cause to believe the evidence would support the conviction of the defendant for the plea offered, and that acceptance of the plea would serve the public interest.

[Signature]
Prosecuting Attorney

ORDER

Based upon the facts set forth in the foregoing Affidavit and certification, the Court finds the defendant's plea of guilty is freely and voluntarily made and it is ordered that defendant's plea of "Guilty" to the charge, set forth in the Affidavit be accepted and entered.

Done in Court this 18 day of January, 19 85.

Kevin Bush
District Judge

00077

State of Utah

JAN 17 1985

THE STATE OF UTAH

Plaintiff

H. Dixon Hindley, Clerk 3rd Dist. Co.

By KAREN S. BLOK

Deputy Clerk

RICK DEAN HICKMAN

Defendant

Affidavit of Defendant

Criminal No. 84-1436

RICK DEAN HICKMAN

I, RICK DEAN HICKMAN, under oath, hereby acknowledge that I have entered a plea of guilty to the charge(s) of:

AGGRAVATED ROBBERY

(Name of Crime)

Elements:

unlawful, intentional taking of
personal property in the possession of another
from his person or immediate
presence, against his will by the
use of a firearm or a deadly weapon.

Facts:

On Nov. 1, 1984 Defendant
unlawfully and intentionally took
property from Arlen Kelson from
his person or immediate presence
against Mr. Kelson's will and by
use of a firearm or a deadly weapon. (amended)

I have received a copy of the charge (Information) and understand the crime I am pleading guilty to is a

First Degree Felony

(Degree of Felony or Class of Misdemeanor)

and understand the punishment for this crime may be

5 years to Life

prison term.

10,000

fine, or both. I am not on drugs or alcohol

My plea of guilty is freely and voluntarily made. I am represented by Attorney

MARY GARCIA

who has explained my rights to me and I understand them.

1. I know that I have a constitutional right to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by a judge should I desire.
2. I know that if I wish to have a trial I have a right to see and hear the witnesses against me in open court in my presence and before the Judge and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have my witnesses subpoenaed at state expense to testify in court upon my behalf and that I could testify on my own behalf, and that if I choose not to do so, the jury will be told that this may not be held against me.
3. I know that if I were to have a trial that the prosecutor must prove each and every element of the crime charged beyond a reasonable doubt, that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a complete agreement of all jurors.
4. I know that under the constitution that I have a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify unless I choose to do so.
5. I know that under the constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me.
6. I know and understand that by entering a plea of guilty I am giving up my constitutional rights as set out in the preceding paragraphs and that I am admitting I am guilty of the crime to which my plea of guilty is entered.
7. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed on me.

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I know that the fact that I have entered a plea of guilty does not mean that the Judge will not later enter a fine, or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be.

7. No promises or threats of any kind have been made to induce me to plead guilty. The following other charges pending against me, to-wit: (Court case number(s) or count(s)): Info omitted to reflect clearly wages
Court's I & II on this case to be dismissed: Case # 85-33 Dismissed
in its entirety, Case # -34 FS 2267 dismissed in its entirety (Current Ct. number 1254)
will be dismissed, and that no other charge(s) will be filed against me for other crimes I may have committed which are now known to the prosecuting attorney. I am also aware that any charge or sentencing concessions or recommendations or probation or suspended sentences, including a reduction of the charges for sentencing made or sought by either defense counsel or counsel for the State, is not binding on the Judge and may not be approved by the Judge.

10. I have read this Affidavit, or I have had it read to me by my attorney, and I know and understand its contents. I am 22 years of age, have attended school through the 11th grade and I can read and understand the English language.

Dated this 18 day of January, 1985

Rick K. Hickman
Defendant

Subscribed and sworn to before me in Court this 18 day of January, 1985

H. D. O. G. H. D. O. G. EY

Kevin Bush

Scott Deibel
Judge

CERTIFICATE OF DEFENSE ATTORNEY:

I certify that I am the attorney for Rick K. Hickman, the defendant named above and I know he has read the Affidavit, or that I have read it to him, and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing Affidavit are in all respects accurate and true.

William Carson
Defense Attorney

CERTIFICATE OF PROSECUTING ATTORNEY:

I certify that I am the attorney for the State of Utah in its case against Rick K. Hickman, defendant. I have reviewed the Affidavit of the defendant and find that the declarations are true and accurate. No improper inducements, threats, or coercions to encourage a plea have been offered the defendant. There is reasonable cause to believe the evidence would support the conviction of the defendant for the plea offered, and that acceptance of the plea would serve the public interest.

John Ellis
Prosecuting Attorney

ORDER

Based upon the facts set forth in the foregoing Affidavit and certification, the Court finds the defendant's plea of guilty is freely and voluntarily made and it is ordered that defendant's plea of "Guilty" to the charge, set forth in the Affidavit be accepted and entered.

Done in Court this 18 day of January, 1985

ATTEST

H. D. O. G. H. D. O. G. EY

Kevin Bush

Scott Deibel

District Judge

10079

ADDENDUM B

Transcript of Rick Hickman's
Guilty Plea Colloquy

P R O C E E D I N G S

JANUARY 18, 1985

1:30 P.M.

THE COURT: State of Utah verses Rick Keith Hickman. There are two files on this. Are we going to handle them both at the same time?

MR. GARCIA: Manny Garcia with Mr. Hickman, Your Honor. This also will be the entry of a plea.

THE COURT: All right. Do you want to state what the plea is going to be?

MR. GARCIA: Your Honor, it's the same thing as what we just did because there is one additional consideration. This case --Mr. Hickman is prepared to plead guilty to Count 3 of 84-1436; Counts 1 and 2 are to be dismissed in the exchange for his plea on this case. The other case that you have for arraignment, and I don't have a Circuit Court number, I just have the District Court number -- I don't have a District Court, I have an 84 FS 2514 which reflected a burglary, second, and aggravated sexual assault, a first degree. Those cases will be dismissed in their entirety.

THE COURT: For the record CR-85-33 --

MR. GARCIA: And there is one other case, Your Honor, which I don't have the file here today. That case was supposed to be arraigned in front of Judge Rokich Monday morning. In that case there is a robbery and burglary of the West Valley incident reflected in that case. That case will also be dismissed. That is

1 also part of this bargain. And the information in this case
2 will be reflected -- it would be amended to reflect deadly
3 weapon rather than a fact firearm or facsimile thereof,
4 and that can be done either by delineation -- and I believe that
5 is now -- I don't have the case number of that other case which is
6 to be arraigned in front of Judge Rokich. I will certainly get
7 that and enter that. So that is the extent of the agreement
8 from Mr. Hickman as well.

9 THE COURT: All right. I need to ask you a few
10 questions, Mr. Hickman. As I understand it, then, you're
11 going to plead to aggravated robbery, a first degree felony,
12 and as I understand it, that's punishable by a term in the --
13 maximum term in the Utah State Penitentiary of at least five
14 years, not more than life, plus a fine of \$10,000 or both, plus
15 you could also be ordered to pay restitution if there is any.
16 Any restitution involved in this case, Mr. D'Elia?

17 MR. D'ELIA: I'm not quite sure.

18 MR. GARCIA: I don't think there is.

19 MR. D'ELIA: There's not.

20 THE COURT: Okay.

21 MR. GARCIA: Although, well, that's my information
22 that there isn't. I believe that's accurate. I don't think
23 anything is owing Mr. Kelson at this time.

24 THE COURT: In any event, then, the maximum sentence
25 could be a fine of up to \$10,000 and a prison sentence up to life.

1 Do you understand that's a possible sentence that you could
2 receive?

3 MR. HICKMAN: Yes, sir.

4 THE COURT: And although you may have got some
5 advice from your attorney about what you think you'll serve
6 out there and so forth, none of those things are binding on me
7 or on the parole; you may be out there for your whole life.. It's
8 possible. Do you understand that's a possibility?

9 MR. HICKMAN: Yes, sir.

10 THE COURT: And that the fine could be imposed in
11 addition to that. Do you understand that's a possibility, too?

12 MR. HICKMAN: Yes, sir.

13 THE COURT: Okay. Now, you were here when I was talking
14 to Mr. Hickman, your brother, about his constitutional rights? Were
15 you listening at that time?

16 MR. HICKMAN: Yes, sir.

17 THE COURT: And you understand you have the same
18 constitutional rights, trial by jury and all those things? Do you
19 understand that?

20 MR. HICKMAN: Yes, sir.

21 THE COURT: And if you enter a plea of guilty, you
22 waive all those rights, do you understand that?

23 MR. HICKMAN: Yes, sir.

24 THE COURT: All right. Now, have you had a chance
25 to read that affidavit that's there?

1 MR. HICKMAN: Yes, I have.

2 THE COURT: And you do read and understand the English --

3 MR. HICKMAN: Yes, I do.

4 THE COURT: And understand what the affidavit says?

5 MR. HICKMAN: Yes.

6 THE COURT: Are you willing to sign it in open court?

7 MR. HICKMAN: Yes.

8 THE COURT: Do you have any questions about it before
9 you do?

10 MR. HICKMAN: No.

11 THE COURT: Okay. Before you do that, I want to go
12 over again the elements of the offense. What they'd have to prove
13 before the jury could find you guilty and have to prove each
14 element beyond a reasonable doubt. They'd have to prove that
15 at 965 South 2200 East in Salt Lake County on or about November 1, 1984
16 you unlawfully and intentionally took personal property in the
17 possession of A.W. Kelson from his immediate presence against
18 his will using some sort of a deadly weapon. They'd have to
19 prove all those things. They'd have to prove against his will, you
20 did intentionally, you used some sort of a deadly weapon, prove
21 it was in Salt Lake County, prove about the time it was. Each
22 one of those things they'd have to prove beyond a reasonable doubt.
23 Do you understand that?

24 MR. HICKMAN: Yes, sir.

25 THE COURT: And then my question is are you pleading

1 guilty because you are in fact guilty?

2 MR. HICKMAN: Yes, sir.

3 THE COURT: All right.

4 MR. D'ELIA: Excuse me Your Honor. Before that goes
5 on, his elements I think should be edited on the records as
6 parties to the offense because that would be very important
7 in pleading as far as the elements are concerned.

8 THE COURT: All right.

9 MR. D'ELIA: The other thing is I was just making
10 a representation before on the restitution, not being directly
11 familiar with the specifics of this case, I do understand there
12 was a shooting involved, and I'm not quite sure what AP&P, when
13 a person is injured with respect to restitution. I'm not saying
14 there is, I'm just indicating for the record that might come up
15 at a later day.

16 THE COURT: All right.

17 MR. GARCIA: Your Honor, there's one thing that I
18 forgot to mention also about the agreements with the state.
19 In exchange for this plea is that there was another pending
20 burglary which the state knew of that they thought Mr. Hickman
21 was involved that they are also not going to file. So other
22 cases they know of will not be filed.

23 THE COURT: All right. Mr. Hickman, you're not
24 under the influence of any drugs or alcohol or anything of that
25

1 nature, are you?

2 MR. HICKMAN: No, sir.

3 THE COURT: Taking any medication at all?

4 MR. HICKMAN: No.

5 THE COURT: Nothing like that that would affect your
6 judgement in any way, is that true?

7 MR. HICKMAN: Yes.

8 THE COURT: And no one has threatened you in any
9 way to get you to plead guilty?

10 MR. HICKMAN: No.

11 THE COURT: No one has promised you anything other
12 than the other charges would be dismissed; is that right?

13 MR. HICKMAN: Yes, sir.

14 THE COURT: All right. Does the State have a Motion
15 then to dismiss those charges?

16 MR. D'ELIA: Your Honor, the State at this time
17 would again as before, keep the same interdelineation; firearms,
18 strike the language.

19 Also with respect to Count 1 and 2, the State would
20 move to formally dismiss those counts. We are aware of the
21 one South Salt Lake case with the aggravated burglary and the
22 sexual assault that's being dismissed.

23 MR. GARCIA: Right.

24 MR. D'ELIA: We move for that. And move for the
25 West Valley case that was waived to be dismissed.

1 MR. GARCIA: The Circuit -- 84-2367?

2 MR. D'ELIA: And with respect to the pending burglary,
3 also the state is aware of those charges and will not file
4 charges pursuant to the agreement as well as any other counts
5 that might arise out of this same criminal episode.

6 MR. GARCIA: Thank you.

7 THE COURT: All right. Then let me ask you, Mr.
8 Hickman, how do you plead to the charge of the aggravated robbery,
9 a first degree felony?

10 MR. HICKMAN: Guilty.

11 THE COURT: Okay. Go ahead and sign that affidavit.

12 MR. GARCIA: Your Honor, I apologize for parts of
13 this affidavit being scratched out when I myself changed
14 for facsimile of a deadly weapon and the affidavit doesn't
15 reflect the circuit court numbers in there because I don't have
16 the circuit court numbers. As long as it's understood what
17 case we are talking about, that shouldn't be any problem.

18 THE COURT: Based upon my questioning of Mr. Hickman,
19 I find the plea has been entered freely and voluntarily,
20 understandingly and doing it of his own free will, understanding
21 the consequences and I'm signing the affidavit.

22 Now, Mr. Hickman, it's my duty to sentence you at a
23 time not sooner than two or later than 30 days unless those time
24 periods are waived by you. What is your pleasure?

25 MR. GARCIA: Your Honor, Mr. Hickman has no expectation

1 of a presentence report would benefit him. I informed the
 2 court he is on parole with the Federal bank robbery charge
 3 that he anticipates he's going to be doing some more time at
 4 least another three years. At this time he's willing to waive
 5 his minimum time and ask sentence be imposed today, realizing
 6 the court will have no choice but to commit him to the Utah
 7 State Prison. He's willing to do that at this point.

8 MR. D'ELIA: Your Honor, in light, especially of the
 9 parole violation and the Federal bank robbery charge, we ask
 10 the maximum five to life.

11 THE COURT: All right. Mr. Hickman, then, I'm going
 12 to sentence you to confinement in the Utah State Penitentiary for
 13 the term not less than five years, more than life and
 14 full amount of restitution as determined by the Board of Pardons,
 15 and that commitment being commenced forthwith.

16 MR. GARCIA: Thank you.

17 Oh, Your Honor, I also -- excuse me -- he also has
 18 some property that was taken when he was arrested.

19 MR. D'ELIA: No objection to that, Your Honor.

20 MR. GARCIA: Could we have that order?

21 THE COURT: It will be released.

22 (Whereupon, the proceedings were concluded.)

23
 24
 25

ADDENDUM C

Transcript of Dean Hickman's
Guilty Plea Colloquy

1 IN THE THIRD JUDICIAL DISTRICT COURT
2 COUNTY OF SALT LAKE, STATE OF UTAH
3 HONORABLE SCOTT DANIELS, JUDGE PRESIDING

4 * * * * *

5 STATE OF UTAH, :
6 Plaintiff, : CR-84-1436
7 -vs- :
8 DEAN KEITH HICKMAN, :
9 Defendant. :

10
11
12
13 JANUARY 18, 1985
14 ARRAIGNMENT & SENTENCING
15
16

17 APPEARANCES:

18 For the State: FRANCIS G. D'ELIA, ESQ.
19 Salt Lake County Attorney's Office
20 231 East 400 South, Suite 300
21 Salt Lake City, Utah 84111
22 For the Defendant: BROOKE C. WELLS, ESQ.
23 Legal Defender's Office
24 333 South 200 East
25 Salt Lake City, Utah 84111

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P R O C E E D I N G S

THE COURT: We'll return, then, to State of Utah verses Dean Keith Hickman.

MS. WELLS: Your Honor, Brooke Wells appearing on behalf of Mr. Hickman who is present.

THE COURT: All right. Are you Mr. Dean Keith Hickman?

MR. HICKMAN: Yes, sir.

THE COURT: Have you had an opportunity to talk with your attorney, Ms. Wells, before the hearing?

MR. HICKMAN: Yeah.

THE COURT: And are you ready to enter a plea at this time?

MR. HICKMAN: Yes, sir.

THE COURT: Is there going --

MS. WELLS: There will be a plea that we will ask the Court to accept, Your Honor. At this time we are asking the Court to accept Mr. Hickman's plea to Count III of the Information which is presently before it. That will be a plea of guilty to Count III, which is Aggravated Robbery, a First Degree Felony. In exchange for Mr. Hickman's plea of guilty, we anticipate that the State will do the following.

First, that it will amend the information that is presently before the Court to indicate that the aggravated robbery, which Mr. Hickman is entering a plea to, would have

1 been committed with a deadly weapon, but will not specify
2 that weapon was a firearm. My affidavit so indicates at this
3 time.

4 We also anticipate that the State will move to
5 dismiss Counts I and II of the Information before it. That
6 the State will file no other cases presently known to it.
7 And that another case which was -- preliminary hearing was
8 held at the same time this one was out of West Valley City,
9 will be dismissed. Unfortunately because I was in trial, I
10 don't have that other file number with me. It has not come
11 up for arraignment in the District Court. But I think we can
12 be specific enough about it on the affidavit that we know
13 which case it is.

14 UNKNOWN SPEAKER: I can give you the Circuit Court --

15 MS. WELLS: Perhaps the Circuit Court number would,
16 at least --

17 MR. D'ELIA: Your Honor, on that, our office is in
18 the process of looking it up, was going to call to give
19 the District Court number.

20 THE COURT: All right. Let me ask you a few
21 questions, then, Mr. Hickman. As I understand it, you're
22 going to plead guilty to the charge of Aggravated Robbery,
23 a First Degree Felony. If I have it right, that is punishable
24 by a maximum sentence of a life sentence no less than five,
25 no more than life in the Utah State Penitentiary and a fine is

1 \$15,000.

2 MS. WELLS: Ten thousand dollars.

3 THE COURT: Ten thousand dollars or both, the fine
4 and the prison sentence. And, even though they are amending
5 their complaint to delete the language about the firearm, I
6 suppose he could be sentenced --

7 MS. WELLS: No, Your Honor, that is the reason for
8 the amendment at this time. The statute states that where a
9 firearm is used, that there is a mandatory enhancement which
10 this Court must sentence the Defendant to. We are asking the
11 Court to accept the State's amendment to avoid that enhancement
12 clause, and that's the reason for the amendment.

13 THE COURT: But isn't the sentence based on whether
14 a firearm is used, not on what the State charges in the
15 Information?

16 MS. WELLS: I don't believe so. And that would be
17 based upon proof that may or may not have come out at the
18 preliminary hearing. But where the State amends that, it would
19 be similar to our being involved in some of the minimum
20 mandatory cases charging sexual offenses. If the State amends
21 out the language which requires the minimum mandatory or
22 in this case the enhancement, then the Court, I don't believe,
23 has that prerogative. Is that your understanding?

24 MR. D'ELIA: Your Honor, that's my understanding,
25 if a firearm is not specifically alleged, Your Honor, over to
a deadly weapon, the enhancement --

1 THE COURT: All right. So you could be sentenced to
2 as much as five in life in the the Utah State Penitentiary,
3 \$10,000 fine, plus any restitution, if there's any damage
4 caused. Do you understand that's a possibility?

5 MR. HICKMAN: Yes.

6 THE COURT: And even though whatever your attorney
7 may have told you about, advice she may have given you, or what
8 the County attorneys agreed to recommend, none of those
9 agreements are binding on me, and I might give you the full
10 sentence. Do you understand that's a possibility?

11 MR. HICKMAN: Yes, sir.

12 THE COURT: And that if I did give you the full
13 sentence, then you decided it wasn't a good idea to plead
14 guilty, it would be too late. You couldn't withdraw your
15 plea anyway. Do you understand that?

16 MR. HICKMAN: Yes, sir.

17 THE COURT: Okay. Now, you're not under -- today
18 under the influence of any drugs, alcohol or anything of that
19 nature?

20 MR. HICKMAN: No, sir.

21 THE COURT: Taking any medication of any kind?

22 MR. HICKMAN: No.

23 THE COURT: Nothing that would affect your judgement
24 in that way?

25 MR. HICKMAN: No, not that I know of.

1 THE COURT: You understand if you plead not guilty,
2 you have a constitutional right to a trial by jury. We would
3 bring the jury in here. I'd tell them that you are innocent
4 until proven guilty. You'd be presumed innocent until proven
5 guilty. The State has the burden of proving you are guilty,
6 have to prove every element of the offense beyond a reasonable
7 doubt. They'd have -- the jury would have to agree unanimously
8 that you were guilty before you could be found guilty.

9 You'd have your attorney with you all through the
10 trial, question any witnesses that the state produced. You
11 could bring in witnesses if you wanted to. You could testify
12 on your own behalf if you wanted to. You have all those
13 rights. Do you understand that?

14 MR. HICKMAN: Yes, sir.

15 THE COURT: And then by pleading guilty, it's --
16 you waive all those rights so you are found guilty the same
17 as if the jury found you guilty of Aggravated Robbery. Do
18 you understand that?

19 MR. HICKMAN: Yes, sir.

20 THE COURT: Let me -- I want you to understand what
21 the elements of the offense are, make sure you know what
22 they'd have to prove.

23 They would have to prove that in Salt Lake County
24 at about 965 South 2200 East, on or about November 1st, 1984,
25 you unlawfully and intentionally took personal property in

1 possession of A. W. Kelson or from his immediate person by
2 threatening with some sort of a deadly weapon. They'd have
3 to prove it was in Salt Lake County. They'd have to prove the
4 date, prove you did it to A. W. Kelson. All those things they
5 have to prove, all the elements that are read. Do you under-
6 stand that?

7 MR. HICKMAN: Yes, sir.

8 THE COURT: Let me ask you this. Is the reason
9 that you are pleading guilty of this charge because you are
10 guilty of it?

11 MR. HICKMAN: Yes, sir.

12 THE COURT: All right. What's your level of
13 education?

14 MR. HICKMAN: Twelfth.

15 THE COURT: And having finished twelfth grade, can
16 you read and understand the English language?

17 MR. HICKMAN: Yes.

18 THE COURT: Have you had a chance to read that
19 affidavit?

20 MR. HICKMAN: Yes, sir.

21 THE COURT: Okay. And do you understand what it says?

22 MR. HICKMAN: Yes.

23 THE COURT: Are you willing to sign it?

24 MR. HICKMAN: Yes.

25 THE COURT: And do you have any questions about it

1 before you do?

2 MR. HICKMAN: No.

3 THE COURT: Okay. You can go ahead and sign it, then.

4 MS. WELLS: Your Honor, I would ask that the State

5 make the Motion to amend that count --

6 MR. D'ELIA: Whenever you are ready, Judge.

7 THE COURT: All right. Go ahead.

8 MR. D'ELIA: The State would move at this time to

9 amend Count III by crossing out on the third line up where it

10 says a firearm, from that point, firearm, all the way through

11 and substitute a deadly weapon by delineation.

12 THE COURT: All right.

13 MR. D'ELIA: And also to dismiss Counts I and II as

14 pertains to Mr. Hickman, Mr. Dean Hickman as party to the

15 offense. And with respect to the other charges, as Ms. Wells

16 represented, we would stipulate that that's the agreement,

17 no other charges in connection with this offense will be filed.

18 THE COURT: The Motion will be granted.

19 Let me ask you Mr. Hickman, after everything we've

20 said, you still want to plead guilty to this?

21 MR. HICKMAN: Yes, sir.

22 THE COURT: And then, let me ask you, how do you

23 plead to the charge of Aggravated Robbery, a First Degree

24 Felony, guilty or not guilty?

25 MR. HICKMAN: Guilty.

1 THE COURT: Okay. You can go ahead and sign that
2 affidavit.

3 MS. WELLS: He has signed it, Your Honor, in open
4 court. I would also indicate Mr. D'Elia has, and I have also
5 signed the affidavit.

6 THE COURT: Based on the questions I asked Mr.
7 Hickman, I find it's a plea entered freely and voluntarily,
8 and I'm accepting the plea and signing the affidavit. It's
9 my duty to sentence you in a time not sooner than two or later
10 than 30 days unless those time periods are waived by you.
11 What's your pleasure in that regard?

12 MS. WELLS: Your Honor, we would waive the minimum
13 and ask the Court to impose sentence today. The Court may
14 or may not know Mr. Hickman is presently on probation for a
15 felony offense to Judge Banks. An Order to Show Cause has been
16 filed in that matter, and we will be indicating to Judge Banks
17 that this plea will have been entered. Based upon that, we
18 feel that there is no real benefit to be gained from asking for
19 a pre-sentence report, and we would ask the Court to impose
20 sentence today, understanding that the Court would have no
21 alternative but to impose the statutory period of time.

22 MR. D'ELIA: That would be the request from the
23 State to impose the maximum sentence.

24 THE COURT: I'm going to sentence you, Mr. Hickman,
25 to serve a term in the Utah State Penitentiary of not less

1 than five years nor longer than life, to be transported there
2 forewith, I suppose.

3 MS. WELLS: One other matter. At the time both
4 brothers, Hickman, were arrested, certain pieces of personal
5 property, their clothing, were taken into evidence. I would
6 ask the Court for an Order releasing that either to them
7 for transportation to the Utah State Prison with them or to
8 a person of their choice since this is personal property,
9 just items of personal property and clothing.

10 MR. D'ELIA: No objection to personal items.

11 THE COURT: That will be the Order.

12 (Whereupon the proceedings were concluded.)

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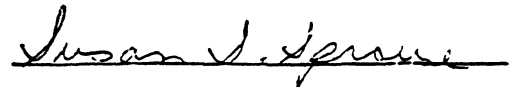
C E R T I F I C A T E

STATE OF UTAH)
 :
COUNTY OF SALT LAKE) ss.

I Susan Sprouse, do hereby certify that I am
a Certified Shorthand Reporter and Notary Public in and
for the State of Utah;

That as such Reporter, I attended the hearing of
the foregoing matter and thereat reported in stenotype
all of the testimony and proceedings had, and caused said
notes to be transcribed into typewriting and the foregoing
pages constitute a full, true, and correct report of the same.

DATED at Salt Lake County , Utah, this 13th day
June, 1988.



Susan S. Sprouse, CSR/RPR

My Commission Expires:
November 1992

ADDENDUM D

State v. Hickman, 779 P.2d 670 (Utah 1989)

[1,2] At first blush, it is difficult to determine the basis of the district court's ruling. It might be argued that it treated the motion to dismiss as a motion for summary judgment, pursuant to rule 56. Utah R.Civ.P. 56. If it had done so, it might have found the facts pertaining to the discharge and the policy manual, as set forth in the depositions, to be without dispute and determined that under the terms of the manual, Lowe was properly discharged. However, we conclude that the district court did not base its ruling on any determination that the relevant facts were undisputed or on any construction of the manual; rather, it appears that the court decided that even if Lowe's factual assertions in the complaint were correct, they provided no legal basis for recovery. We are led to this conclusion because the trial judge never unsealed the depositions taken by the parties and deposited with the clerk; therefore, he could not have resolved any of the flatly conflicting assertions in the parties' memoranda regarding what discovery had revealed. See *Thompson v. Ford Motor Co.*, 384 P.2d 109, 109 (Utah 1963). Moreover, the policy manual was never introduced into evidence. The court could only have considered the facts alleged in the complaint, which had to be taken as true for purposes of the motion to dismiss and dismissed the complaint under rule 12(b)(6). We must now determine whether, on the facts alleged in Lowe's complaint, the law may provide any relief.

The district court's dismissal of the complaint occurred before our recent decision of *Berube v. Fashion Centre, Ltd.* In that case, we refused to recognize a variety of wrongful discharge actions sounding in tort. However, we did recognize that although there is a presumption that employment is terminable at will, that presumption can be rebutted. *Berube*, 771 P.2d at 1044 (Durham, J., joined by Stewart, J.), 1051 (Zimmerman, J., concurring in the result); *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483, 485-486 (1989). If the presumption is rebutted, the discharged employee may have a claim for breach of contract if the employer discharged the employee without complying with the terms of the agreement under which the employee worked. *Berube*, 771 P.2d at 1044-46, 1050 (Durham, J., joined by Stewart, J.), 1052-53 (Zimmerman, J., concurring in the result); *Caldwell*, 777 P.2d at 486. Under the factual allegations of the complaint filed in the present case,

Lowe has stated such a claim for breach of contract. She claims generally that her discharge was in violation of the terms of a company manual that prescribed policies and procedures governing the discharge of employees. Construing these allegations in a light most favorable to Lowe, the facts support a claim for contract damages under *Berube*. See *Berube*, 771 P.2d at 1044-46 (Durham, J., joined by Stewart, J.), 1050 (Howe, Assoc. C.J., concurring, joined by Hall, C.J.), 1052-53 (Zimmerman, J., concurring in the result); *Caldwell*, 777 P.2d at 486. Therefore, we vacate the grant of the motion to dismiss and remand for further proceedings.

HALL, C.J., HOWE, Associate C.J.,
STEWART and DURHAM, JJ., concur.



STATE of Utah, Plaintiff and Appellee,
v.

Rick Keith HICKMAN, Defendant
and Appellant.

STATE of Utah, Plaintiff and Appellee,
v.

Dean Keith HICKMAN, Defendant
and Appellant.

No. 880305, 880362.
Supreme Court of Utah.
Aug. 17, 1989.

Defendants moved to set aside guilty pleas to charges of aggravated robbery. The Third District Court, Salt Lake County, Scott Daniels, J., denied the motions. Defendants appealed. The Supreme Court held that: (1) there was factual basis for plea where defendants entered the victim's house and shot the victim, though no property was taken, and (2) plea of one defendant would not be set aside on ground he was not asked by trial court whether he entered into guilty plea without threats, promises or inducements, where record taken as a whole showed plea was entered without threats or promises.

Affirmed.

Stewart, J., concurred in the result.

1. Criminal Law ¶1149

Supreme Court will uphold the denial by the trial court of motion to withdraw a guilty plea, absent abuse of discretion.

2. Criminal Law ¶273(4)

There was factual basis for trial court to accept the pleas of guilty to aggravated robbery by defendants who did not take any property from the victim, where the defendants did enter the victim's house with a shotgun and shot the victim while attempting to commit a robbery. U.C.A. 1953, 76-6-302.

3. Robbery ¶12

Under statute, the entry into the home of the victim with sawed-off shotguns constituted a "substantial step towards the commission of the offense" of robbery, and thus an attempted robbery. U.C.A. 1953, §§ 76-4-101, 76-6-302.

4. Criminal Law ¶1167(5)

Failure to ask defendant if the guilty plea was entered free from threats, promises, and inducements was not reversible error where defendant signed an affidavit stating he had entered the plea free from threats, promises and inducements and the trial court asked the defendant whether he had read the affidavit, determining the defendant did voluntarily enter into the agreement, and witnessed the affidavit. U.C.A. 1953, § 77-35-11(e)(4, 6), (f).

Rick Keith Hickman, pro se.

Dean Keith Hickman, pro se.

David L. Wilkinson, Sandra L. Sjogren,
Salt Lake City, for plaintiff and appellee.

PER CURIAM:

Defendants appeal from the denial of their motions to set aside their guilty pleas to charges of aggravated robbery, Utah Code Ann. § 76-6-302 (1978). We affirm the trial court's rulings.

Defendants are two of three brothers who were involved in the forced entry of a residence in Salt Lake City in November of 1984. According to the probable cause statement, defendants were armed with

sawed-off shotguns and shot one victim at close range when he resisted their demands to empty pockets of personal belongings. Defendants were later charged with attempted first degree murder, aggravated burglary and aggravated robbery. In January of 1985, defendants pleaded guilty to aggravated robbery pursuant to a plea agreement that dismissed the other two counts as well as unrelated charges. In a consolidated hearing before the trial court, defendants moved to withdraw their guilty pleas in July of 1988. The motions were denied, and defendants appealed separately. This Court again consolidated the two cases.

[1] We uphold the trial court's denial of a motion to withdraw a guilty plea absent abuse of discretion. *State v. West*, 765 P.2d 891 (Utah 1988); *State v. Mildenhall*, 747 P.2d 422 (Utah 1987).

[2] Defendants contend that it was error for the trial court to accept their guilty pleas to aggravated robbery, because no property was actually taken from the victims. Consequently, they say, no factual basis existed for the plea. In support of that claim, defendants point to a separate hearing before the same trial judge, where their brother Boyd successfully argued that no property was actually taken during the holdup and where the trial court allowed the guilty plea to be withdrawn. Defendants fail to acknowledge that they were armed, whereas their brother was not. That factual distinction is dispositive here.

In *State v. Cantu*, 750 P.2d 591, 598 (Utah 1988), the defendant similarly attacked his conviction of aggravated robbery on the ground that nothing had been taken from the person or immediate presence of the victim. He argued that that taking was an element that had to be proved in order to establish the offense. We responded in language that ends the inquiry on the same issue now before us:

We do not agree. Aggravated robbery is defined in Utah Code Ann. § 76-6-302 (1978):

Utah Code Ann.
Section 76-6-302
Aggravated Robbery
1. A person is guilty of aggravated robbery if he or she
a. Takes the property of another person by force or threat of force;
b. Is armed with a dangerous weapon;
c. Inflicts or attempts to inflict serious bodily injury on the victim;
d. Knows or has reason to know that the victim is a police officer, peace officer, or firefighter.

(1) A person commits aggravated robbery if in the course of committing robbery, he:

- (a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or
- (b) Causes serious bodily injury upon another.

....

(3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

(Emphasis added.) Our statutory scheme does not require proof of all elements necessary to prove a robbery, specifically, a taking from the "person, or immediate presence," to establish the "in the course of committing a robbery" requirement of aggravated robbery. So long as there is an attempt, coupled with the use of a firearm, knife, facsimile thereof, or another deadly weapon, or the accused causes serious bodily injury, the elements of aggravated robbery are satisfied.

[3] Defendants' entry into the home of the victims with sawed-off shotguns constituted the attempt, since it was a "substantial step towards the commission of the offense" under Utah Code Ann. § 76-4-101 (1978). That action also satisfied the element of "in the course of committing a robbery" under section 76-6-802(1). The actual shooting satisfied both subsections (a) and (b) of that same section, thus constituting the elements of aggravated robbery that provided the factual basis for the convictions.

1. *State v. Gibbons* had not been decided at the time defendants entered their pleas. This Court has previously stated that when a new rule of criminal procedure constitutes a clear break with the past, it will not be applied retroactively. *State v. Norton*, 675 P.2d 577 (Utah 1983), cert. denied, 466 U.S. 942, 104 S.Ct. 1923, 90 L.Ed.2d 470 (1984), overruled on other grounds, *State v. Hansen*, 734 P.2d 421 (Utah 1986); accord *State v. Vasiliopoulos*, 756 P.2d 92 (Utah App.1988); see also *State v. Jonas*, 725 P.2d 1378 (Utah 1986) (discretionary use of cau-

Defendants also claim that an attempt at aggravated robbery, defined under section 76-4-102(2), reduces a felony of the first degree to a felony of the second degree and that they were therefore improperly sentenced to a first degree felony. We need not address that issue, inasmuch as defendants were properly convicted of aggravated robbery, as stated above.

[4] Defendant Dean Keith Hickman also claims that the trial court failed to ask him, before accepting his plea, whether his plea of guilty was entered free from threats, promises, and inducements, as required by rule 11(e)(4), (6), and (f) of the Rules of Criminal Procedure, as well as by rule 8.6 of the Rules of Practice. He cites *State v. Gibbons*, 740 P.2d 1809 (Utah 1987),¹ which places the burden of establishing compliance with these requirements on the trial court. Although it is true that the trial court did not specifically ask Dean "whether any force or threats or any promises, apart from plea agreement, were used to obtain the plea," Rule of Practice 8.6(B), that omission was the only one that could be ascribed to the trial judge. The affidavit signed by Dean did contain the language, and the trial court asked defendant whether he had read it and then stated that based on the questions he had asked Dean, he found that Dean had entered the plea freely and voluntarily. The trial court then witnessed the affidavit previously signed by Dean. The record as a whole thus affirmatively establishes that Dean entered his guilty plea free from threats or promises. *Warner v. Morris*,² 709 P.2d 809 (Utah 1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *Brady v. United States*, 897 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747

tionary eyewitness instruction applied, where case was tried before *State v. Long*, 721 P.2d 483 (Utah 1986), which mandated use, prospectively, of cautionary instruction whenever eyewitness identification is a central issue).

2. Although this case, too, was decided after defendants' entries of pleas, it nonetheless applied the standard required by *Alford*, *Brady*, and *Boykin*, decided prior to defendants' pleas.

(1970); *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 28 L.Ed.2d 274 (1969)).

The denial of defendants' motions for withdrawal of guilty pleas is affirmed.

STEWART, J., concurs in the result.



NEPHI CITY, a municipal corporation,
Plaintiff and Appellant,

v.

Dee C. HANSEN, State Engineer of the
State of Utah; and Utah State Division
of Wildlife Resources, Defendants and
Appellees.

No. 860614.

Supreme Court of Utah.

Aug. 31, 1989.

City sought judicial review of a decision of the state engineer that the city had forfeited its nonconsumptive water rights through nonuse. The Fourth District Court, Juab County, Boyd L. Park, J., upheld the decision. City appealed. The Supreme Court, Zimmerman, J., held that: (1) the city forfeited its nonconsumptive water rights by not using those rights for approximately 80 years, and (2) the constitutional prohibition against transfer of municipal water rights is directed against voluntary transfers, not involuntary transfers and, thus, a forfeiture of municipal water rights through nonuse did not violate the Constitution.

Affirmed.

1. Waters and Water Courses ¶151

City forfeited its nonconsumptive water rights by not using those rights for approximately 80 years. U.C.A.1953, 73-1-4.

2. Waters and Water Courses ¶153

Constitutional prohibition against transfers of municipal water rights is directed against voluntary transfers only, not against involuntary transfers. U.C.A. 1953, 73-1-4; Const. Art. 11, § 6.

Donald J. Eyre, Nephi, for plaintiff and appellant.

R. Paul Van Dam, Michael M. Quealy, Salt Lake City, for defendants and appellees.

ZIMMERMAN, Justice:

Plaintiff Nephi City appeals from an order denying its motion for summary judgment and granting the motion of defendant Dee C. Hansen, State Engineer, and defendant Utah State Division of Wildlife Resources for summary judgment. The summary judgment upheld the State Engineer's decision rejecting Nephi City's applications to change the points of diversion of four claimed water rights. The State Engineer rejected the applications on the grounds that the four water rights in question had been forfeited through nonuse under section 73-1-4 of the Code. Utah Code Ann. § 73-1-4 (1980) (amended 1987 & 1988). Nephi City claims that a municipal corporation's water rights cannot constitutionally be forfeited through nonuse under article XI, section 6 of the Utah Constitution. It contends that to the extent that section 73-1-4 provides for such a forfeiture, it is unconstitutional. We reject Nephi City's assertions and affirm the district court.

The material facts are not in dispute. During the first half of this century, Nephi City acquired four nonconsumptive water rights on Salt Creek in Juab County. The beneficial use to which they were to be put was power generation. Nephi City used these water rights to generate electricity until the early 1950s, when a flood on Salt Creek destroyed the diversion and conveying works. From the flood until the early 1980s, these water rights were not beneficially used by Nephi City.

In 1982, Nephi City proposed to construct a new hydroelectric facility. Pursu-

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ADDENDUM E

Findings of Fact, Conclusions of Law and Order

SEP 13 1993



JAN GRAHAM (1231)
Attorney General
ANGELA F. MICKLOS (6229)
Assistant Attorney General
Attorneys for Respondents
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

DEAN K. HICKMAN,	:	
RICK K. HICKMAN,	:	
	:	FINDINGS OF FACT,
Petitioners,	:	CONCLUSIONS OF LAW AND
	:	ORDER
	:	
TAMARA HOLDEN,	:	
FRED VAN DER VEUR,	:	Case No. 920902029 HC
	:	
Respondents.	:	Judge Kenneth Rigtrup
	:	

Petitioners' petition for habeas corpus or post-conviction relief came before the court for an evidentiary hearing July 27 and 28, 1993, the Honorable Kenneth Rigtrup presiding. Petitioners were present and were represented by Andrea C. Alcabes. Respondents were represented by Angela F. Micklos, Assistant Attorney General. After hearing testimony, receiving evidence, and hearing arguments of counsel, the Court, being fully advised, now enters the following:

FINDINGS OF FACT

1. On January 18, 1985, Petitioners pled guilty to aggravated robbery.

2. Petitioner Dean Hickman was represented by Brooke Wells. Petitioner Rick Hickman was represented by Manny Garcia.

3. On or about December 15, 1984, petitioners met with their attorneys in a room in the circuit court building to discuss the charges against them.

4. Detective Don Bell of the Salt Lake City Police Department came in at least during the latter portion of the meeting between petitioners and their attorneys.

5. Brooke Wells had some discovery materials relating to the aggravated robbery charges.

6. Ms. Wells neither shared the physical discovery materials with petitioners, nor discussed their content with great specificity. However, she did advise petitioners, at least in a conclusory manner, that there was substantial evidence against them.

7. Two of the prosecution's potential witnesses were co-conspirators.

8. Petitioners had a pending order to show cause proceeding pending before Judge Banks.

9. In 1988, petitioners filed a motion to withdraw their pleas, which Judge Daniels denied.

10. The Utah Supreme Court affirmed the denial of petitioners' motion.

CONCLUSIONS OF LAW

1. Even if all of petitioners' allegations regarding counsels' deficiencies are true, petitioners failed to prove that absent counsels' errors, they would have insisted upon going to trial.

2. Petitioners failed to meet the prejudice prong necessary to demonstrate ineffective assistance of counsel, as stated in Strickland v. Washington, 466 U.S. 668 (1984), and Hill v. Lockhart, 474 U.S. 52 (1985).

ORDER

The Court having entered its Findings of Fact and Conclusions of Law, and good cause appearing, it is hereby ORDERED, ADJUDGED AND DECREED as follows: The petition for habeas corpus or post-conviction relief is denied.

DATED this 13th day of ~~August~~ ^{September}, 1993.

BY THE COURT:


HONORABLE KENNETH RISTRUP
Third District Court

Approved as to form:

151
ANDREA C. ALCABES
Attorney for petitioners

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing unsigned **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** was mailed, postage prepaid, this 24th day of August, 1993 to:

Andrea C. Alcabes, Esq.
HANSON, NELSON, CHIPMAN & QUIGLEY
136 South Main Street, Suite 910
Salt Lake City, Utah 84101

Angela F. Mickles

ADDENDUM F

Deposition of Brooke Wells

CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

* * *

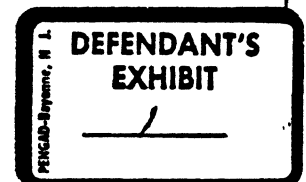
DEAN K. HICKMAN,)	
RICK K. HICKMAN,)	Civil No. 920902029
)	(Judge Kenneth Rigtrup)
Plaintiffs,)	
)	Deposition of:
vs.)	
)	<u>BROOKE C. WELLS</u>
TAMARA HOLDEN,)	
FRED VAN DER VEUR,)	
)	
Defendants.)	

Deposition of BROOKE C. WELLS, taken at the instance and request of the Defendants, at the Utah State Prison Oquirrh 5 facility, Draper, Utah, on Wednesday, June 16, 1993, at 12:08 p.m., before Vicky McDaniel, a Registered Professional Reporter and Notary Public in and for the State of Utah, Utah License No. 285.

* * *



Associated Professional Reporters
10 West Broadway / Suite 200 / Salt Lake City, Utah 84101



A P P E A R A N C E S

For the Plaintiffs: Andrea C. Alcabes, Esq.
 HANSON, NELSON, CHIPMAN
 & QUIGLEY
 136 S. Main St., Suite 910
 Salt Lake City, UT 84101

For the Defendants: Angela F. Micklos, Esq.
 ASSISTANT ATTORNEY GENERAL
 330 South 300 East
 Salt Lake City, UT 84111-2525

Also Present: Paula Glassett
 Dean Hickman
 Rick Hickman

I N D E X

<u>The Witness</u>	<u>Page</u>
<u>BROOKE C. WELLS</u>	
Examination by Ms. Micklos	3

E X H I B I T S

<u>Number</u>	<u>Page</u>
A (1-13-88 letter to Dean Hickman from Ms. Wells).....	9

* * *

P R O C E E D I N G S

BROOKE WELLS,

called as a witness at the instance of the
Defendants, having first been duly sworn,
was examined and testified as follows:

EXAMINATION

BY MS. MICKLOS:

MS. MICKLOS: I suppose since this is just in
lieu of the testimony that would have been taken at the
evidentiary hearing that we will just proceed as we would
had we been at the hearing.

MS. ALCABES: Okay.

MS. MICKLOS: In other words, Brooke would be my
witness and I would just do some direct examination and you
can cross examine.

MS. ALCABES: Fine.

MS. MICKLOS: And also, just for the record
before we begin, I'm just going to object to Mr. Rick
Hickman's presence only because Ms. Wells did not represent
Rick Hickman, and so therefore her testimony is really
irrelevant as far as he's concerned. His claims go to Andy
Garcia's representation of him and not Ms. Wells'. So I
realize there's nothing that can be done about it at this
point. I just want to make that clear that--

MS. ALCABES: Well, for the record, if you want

1 to address that now, Rick was present on some of the
2 occasions in question and he is a petitioner in this matter,
3 they're both petitioners--

4 MS. MICKLOS: That's true.

5 MS. ALCABES: --and I think he has the right to
6 be here present to confront witnesses against him.

7 Q (BY MS. MICKLOS) So we'll go on. Please state
8 your name.

9 A Brooke Wells.

10 Q And what is your occupation?

11 A Attorney.

12 Q How long have you been an attorney?

13 A Sixteen years this--sixteen years in September.

14 Q Did you represent Dean Hickman in 1984 and '85 on
15 an aggravated robbery charge?

16 A I represented him on that as well as on another
17 matter.

18 Q Okay. And there are several claims that
19 Mr. Hickman has made against you. First of all, Mr. Hickman
20 claims that you coerced him into pleading guilty. Is that
21 true?

22 A No.

23 Q He claims specifically that you threatened him
24 with additional charges if he were not to take the plea.
25 Did you make that statement?

1 A I would have not made such a statement, first of
2 all because I don't have the authority to bring charges. I
3 do, however, believe that I advised him that other charges--
4 that there was a potential for other charges out there.

5 Q Okay.

6 A And specifically as a part of any plea agreement
7 the state would agree not to file other charges.

8 Q He further claims that--did you make any
9 representation to Mr. Hickman regarding the specific number
10 of years he might spend in prison as a result of the plea or
11 as a result of not entering the plea?

12 A All right. I would not have told him that he
13 would serve a specific number. There's many reasons^s for
14 that. First of all, it's clear that Board of Pardons has
15 that option. Given the plea bargain that he was offered,
16 however, I did advise him to accept the plea to the one
17 count of aggravated robbery without a firearm enhancement
18 because that would minimize the amount of time that he would
19 do to a minimum of five as opposed to a possible minimum of
20 up to 30 if he were convicted of each of the three counts
21 against him in that information, each of which carried a
22 five to life and each of which carried a firearm
23 enhancement.

24 Q At any time did you ever tell him that if he did
25 not accept the plea he would do 13 years?

1 A No. I would have had no way of knowing how much
2 time he could have expected to do, because that's within the
3 purview of the Board of Pardons.

4 Q Mr. Hickman also claims that you allowed
5 Detective Bell to be present during some confidential
6 discussions, attorney-client discussions. Is that true?

7 A No, that is not true, and I have insufficient
8 information about what his claim is to be able to answer
9 anything more specifically about it. I don't know when he's
10 claiming that occurred, where, under what circumstances. I
11 don't know.

12 Q At any time do you recall having Detective Bell
13 present when you were speaking with Mr. Hickman?

14 A I do not recall that. Detective Bell was present
15 at the court proceedings the day that--in the preliminary
16 hearing when the waivers were entered.

17 Q Mr. Hickman also claims that you refused to file
18 discovery motions which he asked you to file. Is that true?
19 Well, first of all, did he ask you to file any discovery
20 motions?

21 A I have no recollection of being specifically
22 asked to file any discovery motions. Do you want me to
23 elaborate?

24 Q Sure.

25 A However, at the time of the preliminary hearing

1 when the waivers were entered and subsequently at the time
2 that the pleas were taken, I was in possession of all
3 discovery materials and, because a plea agreement had been
4 struck, felt no necessity to file for additional discovery
5 materials.

6 Q Mr. Hickman next claims that you falsified a
7 plea, his plea affidavit. Let me expand on that a little
8 bit so you can understand. Essentially he's claiming that
9 no property was actually taken from the victim; however, on
10 the plea agreement--excuse me, on the statement of defendant
11 he lists it, lists that the property of an A. W. Kelson was
12 taken. I will show you--or you have a copy already--the
13 Affidavit of Defendant.

14 Do you know why it states, the plea affidavit
15 states that the property was taken?

16 A Yes, I do. Mr. Hickman was charged with attempt-
17 ed criminal homicide, a first degree felony; aggravated
18 kidnapping, a first degree felony; and aggravated robbery, a
19 first degree felony. He was alleged in the documents to
20 have been the trigger man or the person who shot Mr. Kelson
21 in the stomach with a 12-gauge shotgun. Those were
22 extremely serious charges and were apparently substantiated
23 through the statements of at least two police informants,
24 Mr. Memmott, Troy Memmott and Kay Lynn Neve I believe is the
25 other person's name.

1 When the offer was made to allow Mr. Hickman to
2 enter a plea of guilty to aggravated robbery, that seemed
3 certainly to be in his best interest, particularly when we
4 were able to get a concession from the state that there
5 would be no firearm enhancement, which in fact is the way it
6 was. Aggravated robbery in my legal opinion carried less of
7 a stigma than did aggravated kidnapping and/or attempted
8 criminal homicide.

9 The elements of aggravated robbery are stated
10 over in the elements portion of the affidavit. The facts
11 which support such an allegation--and you have to understand
12 that aggravated robbery is a bit of a hybrid category; it
13 does not require the actual taking of property to
14 substantiate a claim of aggravated robbery. Based upon the
15 evidence before us, it appeared clear that the aggravated
16 robbery or the taking of property or the attempt to take
17 property from the Kelsons occurred with an intent to
18 actually take the property.

19 This was clearly the lesser of the three very
20 serious charges against him, and so I stated those facts in
21 terms of what satisfied the aggravated robbery charge, and
22 they agreed to that. And that was explained to Mr. Hickman
23 as is evidenced by his signature on the affidavit.

24 Q Mr. Hickman next claims that you told him you
25 would appear before the Board of Pardons and guarantee that

1 he would only spend five years in prison. Did you ever tell
2 him that?

3 A I'm certain that I told him that I would appear
4 with him at the Board of Pardons because it is my practice
5 to offer that help to my clients. I've looked through the
6 file and through messages and have no information or
7 recollection of ever being contacted about when a board
8 meeting would be, and therefore I did not appear.

9 With regard to a guarantee that he would only do
10 five years, that did not occur. I do not have the authority
11 to make such guarantees, and would not ever make that type
12 of guarantee.

13 Q Mr. Hickman's final claim is that you failed to
14 appeal on his behalf. Did he ever ask you to appeal?

15 A No. What he--when entering his plea he waives
16 his right to appeal. So no, I did not pursue an appeal.

17 Q Do you recall any response you may have made to
18 him regarding an appeal? I'll show you what I've marked as
19 Defendant's Exhibit A, which I would have introduced at the
20 hearing and I probably still will. Do you recognize that?

21 A I do.

22 Q How do you recognize that?

23 A It's a letter that I sent to Mr. Hickman in
24 January of 1988 discussing with him what could be provided
25 in terms of habeas corpus relief. Under the contract with

1 the legal defender office we have no authority, in fact are
2 prohibited from representing clients beyond the pendency of
3 right of first appeal. And since there had been a waiver of
4 that right through the plea, I was not in a position to
5 represent him in any habeas matters, and that's what I
6 believe I indicated in that letter of January looks like
7 13th, 1988.

8 MS. MICKLOS: Well, I believe those are all the
9 claims that have been outlined in the petition. I believe
10 that's all I have.

11 THE WITNESS: Thank you.

12 MS. ALCABES: We don't have any questions.

13 (Deposition was concluded at 12:20 p.m.)

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C E R T I F I C A T E

STATE OF)
 : ss.
 COUNTY OF)

I HEREBY CERTIFY that I have read the foregoing testimony consisting of 8 pages, numbered from 3 to 10, inclusive, and the same is a true and correct transcription of said testimony with the exception of the corrections I have listed below in ink, giving my reasons therefor.

Page__	Line__	Correction_____
		Reason_____
Page__	Line__	Correction_____
		Reason_____
Page__	Line__	Correction_____
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Page__	Line__	Correction_____
		Reason_____

 BROOKE C. WELLS

SUBSCRIBED AND SWORN to at _____,
 this____ day of____, 19____.

My Commission Expires: _____ Notary Public

Residing at:_____

C E R T I F I C A T E

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of Brooke C. Wells, the witness in the foregoing deposition named, was taken before me, Vicky McDaniel, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing in Salt Lake County.

That the said witness was by me, before examination, duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause.

That the testimony of said witness was reported by me in Stenotype and thereafter caused by me to be transcribed into typewriting, and that a full, true, and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages numbered from 3 to 10, inclusive, and said witness deposed and said as in the foregoing annexed deposition.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the event thereof.

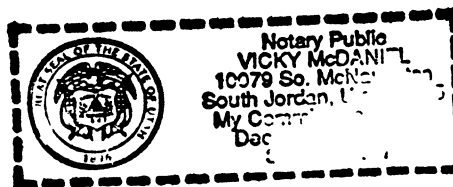
WITNESS MY HAND and official seal at Salt Lake City, Utah, this 16th day of June, 1993.

Vicky McDaniel

VICKY MCDANIEL, CSR, RPR, CM
Utah License No. 285

My commission expires:

December 19, 1994



SALT LAKE LEGAL DEFENDER ASSOCIATION

333 SOUTH SECOND EAST
SALT LAKE CITY, UTAH 84111
532-5444

Felony-Misdemeanor Divisions

F. JOHN HILL
Director

BOARD OF TRUSTEES

January 13, 1988

ROBERT VAN SCIVER
Chairman

D. GILBERT ATHAY
Ex-Officio

LIONEL FRANKEL
JIMI MITSUNAGA
IRENE NIELSEN
RAY GROUSSMAN
STEWART HANSON, Jr.
LON HINDE
JAY LOWE
JOHN O'CONNELL
JOSEPH A. GETER

Mr. Dean Hickman
c/o Utah State Prison
P.O. Box 250
Draper, Utah 84020

Dear Mr. Hickman:

I hope you have received the copy of the Affidavit which was mailed to you last month.

It appears that you are interested in pursuing some sort of Habeas Corpus relief attacking the sentence you received as being excessive or illegal. We do not, as a general rule, order transcripts of sentencing proceedings since we are not obligated, by contract, to pursue any legal action on your behalf once a plea has been entered. This is because you have, as your Affidavit states, given up the right to pursue any appeal in the Utah state Courts. Therefore, the remedy available to you is through collateral attack. We do not handle those matters. Therefore, you should contact the law firm of McCullough, Jones, Jensen & Ivins who has a contract with the Utah State Prison to represent clients similarly situated. They can, if that Habeas Corpus action is filed, make the proper request of the court that a transcription be provided.

I'm sorry I will not be able to help you further.

Sincerely,


BROOKE C. WELLS
Attorney at Law

bp

DEFENDANT'S
EXHIBIT

A

SALT LAKE LEGAL DEFENDER ASSOCIATION

333 SOUTH SECOND EAST
SALT LAKE CITY, UTAH 84111
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Sincerely,


BROOKE C. WELLS
Attorney at Law

bp

DEFENDANT'S
EXHIBIT

A

ADDENDUM G

Transcript of Post-Conviction Evidentiary Ruling

1 IN THE THIRD JUDICIAL DISTRICT COURT FOR
2 SALT LAKE COUNTY, STATE OF UTAH

3 * * *

4 DEAN K. HICKMAN,)
5 RICK K. HICKMAN,)
6 Plaintiffs,)
7) Case No. 920902029
8 TAMARA HOLDEN,) JUDGE KENNETH RIGTRUP
9 FRED VAN DER VEUR,)
 Defendants.)

10 -----

11 BE IT REMEMBERED that on the 28th, 1993,
12 at 10:00 o'clock a.m., this cause came on for hearing
13 before the HONORABLE KENNETH RIGTRUP, District Court,
14 without a jury in the Salt Lake County Courthouse,
15 Salt Lake City, Utah.

16 -----

17 A P P E A R A N C E S:

18 For the Plaintiffs: ANDREA C. ALCABES
19 Attorney at Law

20 For the Defendants: ANGELA F. MICKLOS
21 Attorney at Law

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23 CAT by: CARLTON S. WAY, CSR, RPR

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P-R-O-C-E-E-D-I-N-G-S

THE COURT: It's striking to the Court that the Petitioners, according to Dean's testimony, met for an hour and a half. The positive details the Court has before it leave a lot to be desired.

The Court has no substantial doubt, based upon Mr. Garcia's testimony, that Officer Bell came in at least in the latter part of the meeting that was going on. And the Court recognizes that the plea negotiations were taking place very early on. I don't think I can remember a file that gets to this level of court, where the Legal Defenders' Office is involved and files a formal written appearance, that the discovery request is not in the file. It is just a routine practice of that office. They weren't at this level at the time they entertained the plea negotiations.

The Court has no doubt from all of the evidence that Ms. Wells did have in her possession some discovery materials. There's no doubt to the Court that at least she, in a conclusory sort of way, advised the Defendants that there was substantial evidence against them. It's clear from this evidence that one of the witnesses against them, or two of the potential witnesses against them, were

1 co-conspirators. And although that's a substantial
2 basis for attacking credibility at trial, the
3 Defendants had a pending order to show cause
4 proceeding pending before Judge Banks. For them to be
5 talking about the potentiality of a habitual criminal
6 charge against them, they had to have at least a one
7 -- a second degree felony conviction, with the
8 potential of being convicted on at least a second
9 degree felony in the case before the Court; and the
10 the pending potential of other charges being made
11 against them.

12 The case concerning the voluntariness of
13 the plea agreement was considered before Daniels. It
14 was appealed. And, certainly, they knew at that point
15 whether they were intimidated or threatened and
16 coerced to enter the plea which was considered by
17 Judge Daniels and was considered by the Utah Supreme
18 Court on appeal. They had an obligation to timely
19 raise that, and they failed to do so.

20 The Court simply is not persuaded from
21 the record before it, given that context, that the
22 errors of counsel -- and the Court does feel that it's
23 clear from the record that the physical discovery
24 materials that Brooke Wells had were not shared. It's
25 clear to the Court that, other than in a conclusory

1 way, she didn't discuss those apparently with great
2 specificity. However, there's been no showing in this
3 hearing as to -- assuming the truth of all of the
4 allegations of the defectiveness of representation of
5 counsel or ineffective assistance of counsel, that
6 they would have insisted on going to trial having once
7 been bound over to the District Court.

8 And the Court finds and concludes the
9 second prong of the Hill and Strickland cases have not
10 been met; accordingly, the Petition is denied.

11 We will be in recess.

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REPORTER'S - CERTIFICATE

STATE OF UTAH)
) ss.
County of SALT LAKE)

I, CARLTON S. WAY, CSR, do hereby certify that

I am a Certified Shorthand Reporter and a Notary
Public in and for the State of Utah;

That I took down the proceedings aforesaid at the time and place therein named and thereafter reduced the same to print by means of computer-aided transcription (CAT) under my direction and control;

I further certify that I have no interest in the event of this action.

WITNESS MY HAND AND SEAL this the 3rd day of
August, 1993.

(Signature)

CARLTON S. WAY, CSR, RPR